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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, CALVERT FIRE INSURANCE COMPANY

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BRIEF FOR RESPONDENT, CALVERT FIRE INSURANCE COMPANY

QUESTION PRESENTED

We accept the statement of the facts in the Petitioner's brief,[1] but not its formulation of questions presented. We suggest that the case, on its facts, presents a single, narrow question:

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1. A note should be added with respect to the status of the action in the state court. The trial court dismissed the counterclaim and struck the defenses going to the federal and state securities laws on the grounds (1) that no "security" was involved and (2) that

When a potential defendant in an action under SEC Rule 10b-5, 17 C. F. R. §240.10-5—over which §27 of the Securities Exchange Act of 1934, 15 U. S. C. §78aa, gives the federal courts exclusive jurisdiction—initiates litigation by bringing a state court action for a declaratory judgment as to the validity of the relevant contract, and the defendant in that action brings its own federal court action under Rule 10b-5, and the federal judge precludes federal resolution of the 10b-5 claim by refusing to decide that claim until the conclusion of the state action, is it error for the Court of Appeals to grant a writ of mandamus ordering the judge to exercise his exclusive jurisdiction over the 10b-5 claim?

SUMMARY OF ARGUMENT

(1) Calvert's efforts in both federal and state courts have been devoted to one end: obtaining a federal determination of its claim that American Mutual sold it a "security" in violation of the antifraud provisions of Rule 10b-5 (as well as the registration requirement of the Securities Act of 1933). Except for the possibility of ultimate review of the highest available state court determination by this Court, there is no way to give Calvert the

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application of the federal securities laws was barred by the McCarran-Ferguson Act (15 U. S. C. § 1012(b)). But it considered those questions sufficiently substantial to warrant an interlocutory appeal. App. D. The Illinois Appellate Court affirmed. *American Mutual Reinsurance Co.* v. *Calvert Fire Ins. Co.*, 52 Ill. App. 3d 922, 367 N. E. 2d 104 (1977). And both that court and the Supreme Court of Illinois declined to permit review by the latter court.

Calvert intends shortly to file a petition in this Court for a writ of certiorari to review the decision of the Illinois Appellate Court, in order to make it possible for this Court, if it is so disposed, to put the "security" question to rest without a decision of that question by the lower federal courts. Meanwhile Calvert has a motion pending before the Supreme Court of Illinois—which American Mutual is resisting—for a stay of its mandate pending this Court's disposition of both the present case and the petition for a writ of certiorari to be filed by Calvert.

federal forum to which it is entitled except mandamus. For, if the federal claims should ever get back to the federal court after a trial in the state court, there may well be nothing left for the federal court to decide except the res judicata or collateral estoppel consequences of the state court's judgment.

(2) In the absence of any of the grounds for "abstention" or any of the considerations of "wise judicial administration" to which this Court referred in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), the District Court had a heavy obligation to proceed—an obligation that attached with respect to Calvert's claims under both Acts, but *a fortiori* with respect to its claim under Rule 10b-5, as to which the District Courts' jurisdiction is by statute exclusive.

(3) The fact that Calvert would be made whole if it successfully defended American Mutual's state action for a declaratory judgment does not reduce the federal court's obligation to exercise its jurisdiction over Calvert's action for rescission. And the very uncertainties and complexities surrounding the impact of the res judicata and collateral estoppel doctrines on a state court's determination of a federal question *by way of defense* (particularly insofar as the federal court's jurisdiction is exclusive) are all the more reason for the federal court to proceed so that those questions will be avoided.

(4) The Petitioner's brief grossly overstates the argument of loss of docket control. A crowded docket cannot justify a refusal to exercise jurisdiction. And any loss of docket control attendant on an affirmance under the circumstances of this case would not be major in any event.

(5) Mandamus is the proper remedy to compel a lower court to exercise its jurisdiction when it has a duty to do so.

(6) Although the district court's order was in form a "stay," it had the effect of a dismissal.

ARGUMENT

I. Under the Circumstances the District Court Had an "Unflagging Obligation" to Exercise Its Exclusive Jurisdiction

First: It has been a basic principle of our federal system for two hundred years, as this Court unanimously emphasized in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 813 (1976), that it is "the duty of a District Court to adjudicate a controversy properly before it." See also *McClellan* v. *Carland*, 217 U. S. 268, 281 (1910); *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 230, 235 (1922). "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U. S. at 813. And none of the "extraordinary and narrow exception[s]" justifying abstention (*ibid.*) is present here. Nor is any of the considerations of "wise judicial administration," discussed in *Colorado River*, that "govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts." 424 U. S. at 817.[2]

Second: What the Court in *Colorado River* called "the heavy obligation to exercise jurisdiction" (424 U. S. at 820) applies *a fortiori* when the federal court's jurisdiction, as under the Securities Exchange Act, is *exclusive*. Apart from the inherent logic of this proposition, *Cotler* v. *Inter-County Orthopaedic Ass'n, P. A.*, 526 F. 2d 537, 542 (3d Cir. 1975), it is implicit in the *Colorado River* statement, apropos of the Court's discussion of "wise judicial administration," that "We need not decide * * * whether * * * dismissal would be warranted * * * if the state

2. American Mutual, of course, brought its declaratory judgment action first. But Calvert's counterclaim and its federal action were filed on the same day. And so far as "the desirability of avoiding piecemeal litigation" is concerned (424 U. S. at 818), the District Court's characterization of the scope of the state court action as "broader" (Pet. for Cert. at B-5) is puzzling even if Calvert's claim for *damages* under Rule 10b-5 is treated as surplusage.

proceeding were in some respect inadequate to resolve the federal claims." 424 U. S. at 820.

Third: To be sure, the federal court's jurisdiction to entertain *actions* under Rule 10b-5 does not prevent a state court from considering a 10b-5 *defense* to an action on the contract (or for a declaratory judgment as in the case at Bar). See *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 259 (1897) (defense alleging invalidity of patent that was basis of action in assumpsit); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 87-88 (1902) (defense of illegality under antitrust laws). But that result is required by the Supremacy Clause. For otherwise the plaintiff might get his judgment "in spite of the defense available to the defendant under the federal portion of the whole congeries of federal and state law applicable to the transaction." 2 Loss, *Securities Regulation* 979 (2d ed. 1961).

The fact that a state court's jurisdiction (indeed, its duty) to decide federal questions by way of *defense* is sometimes greater than its jurisdiction to decide federal question *claims* is, in a sense, an inherent imperfection of our federal system. But, when the state court defendant seeks out the federal forum that Congress clothed with exclusive jurisdiction over the federal claim, the federal court should not go out of its way to defer to a state court on federal issues just because the potential federal court defendant gets to the state courthouse with an action for a declaratory judgment (or it might be for breach of contract) before the state court defendant files his 10b-5 claim in a federal court.

Fourth: As we have suggested in our statement of the question presented, all that the Court needs to decide is that the District Court's "virtually unflagging obligation * * * to exercise [its] jurisdiction" (*Colorado River*, 424 U. S. at 817) allows it no discretion when a state court defendant invokes the *exclusive* jurisdiction of the federal court over a 10b-5 action. But Calvert claims also that American Mutual violated the registration requirement of §5 of the Securities Act of 1933 (15 U. S. C.

§77e). And, even though §22(a) of the 1933 Act (15 U. S. C. §77v(a)) gives the federal and state courts concurrent jurisdiction, we submit that the District Court's obligation to exercise its concurrent jurisdiction—as in the *Colorado River* case itself (subject to the exceptions there considered)—is no less "unflagging" than its obligation to exercise the exclusive jurisdiction given it in the 1934 Act.

Fifth: Whether federal jurisdiction is exclusive or concurrent, the fact that federal judges are considerably more experienced with respect to the construction of the federal securities statutes points to additional reasons of policy for their not going out of their way to defer to state courts:

(1) Just as the federal courts have been cautioned by this Court to limit the exercise of their pendent jurisdiction so as to procure for the parties "a surer-footed reading of applicable [state] law" by state courts, *United Mine Workers of America* v. *Gibbs*, 383 U. S. 715, 726 (1966), similarly a "surer-footed reading" of the applicable *federal* law of securities regulation will be rendered by federal courts.[3]

In this very case—notwithstanding (a) the broad reading given the definition of "security" by this Court in no fewer than six cases,[4] (b) the literally scores of cases in the lower federal courts, as well as the state courts under the blue sky laws, that have construed that term in a tremendous variety of contexts, (c)

3. There is nothing in the majority opinion in *Colorado River* that is inconsistent with Mr. Justice Stewart's observation in his dissenting opinion: "A federal court is more likely than a state court to be familiar with federal water law and to have had experience in interpreting the relevant federal statutes, regulations, and Indian treaties." 424 U. S. at 825-26.

4. *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943); *SEC* v. *W. J. Howey Co.*, 328 U. S. 293 (1946); *SEC* v. *Variable Annuity Life Ins. Co. of America*, 359 U. S. 65 (1959); *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202 (1967); *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967); *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837 (1975). The Court has recently granted certiorari in a seventh case. *International Brotherhood of Teamsters* v. *Daniel*, No. 77-753.

the agreement of Calvert and American Mutual that the case at Bar is one of first impression, and (d) the state trial judge's certifying his order for interlocutory review under Illinois Supreme Court Rule 308 (Ill. Rev. Stat. 1975, c. 110A, §308) as involving "questions of law as to which there is substantial grounds [*sic*] for difference of opinion" (App. D)—his entire opinion (dictated from the bench) on the "security" question read (App. A):

> Based on my opinion [*sic:* examination?] of the record, the briefs, the transcript and the arguments, it appears that the principal test, which is applied by the upper courts in the resolving of this very thorny issue, is whether or not—Strike that. Is a consideration of the nature of the transaction and the capacity of the parties dealing therein.
>
> Accordingly, I further find, again, unfortunately at the risk of oversimplification, that the issue is simply this, whether or not the right to participate in the profits and to share the losses of this organization constitutes a security interest within the meaning of the applicable State and Federal Statutes. I specifically find that it does not. That is my ruling.[5]

(2) If the basic "security" question—which is common to Calvert's claims under §5 of the 1933 Act and §10(b) of the 1934 Act—is decided by a federal court, it will, of course, be reviewable in a federal appellate court. To the extent, on the other hand, that the meaning of the critical term "security" in these federal statutes is decided in the state courts, the unifying task of this Court would be greatly enlarged; for the Court might well feel itself under pressure, as the first federal court on the scene, to use its certiorari procedure to review the decisions of state appellate courts more often than it would feel the need to review decisions of the United States Courts of Appeals.

Sixth: The "exclusive jurisdiction" of §27 applies to *"all* suits in equity and actions at law brought to enforce any liability

5. The orders added, as a conclusion of law, that Calvert "was not, as a matter of law, a purchaser of a security but rather a seller of reinsurance contracts." Pp. B-3, C-2 *infra*.

or duty created by this [Act] or the rules and regulations thereunder" (italics supplied). That language manifestly extends to actions for rescission as well as damages. Indeed, the complexities of securities litigation have inevitably caused a blurring between the two forms of relief under Rule 10b-5 through the granting in appropriate circumstances of "rescissional damages."[6] Hence it is of no consequence that Calvert, since it has not yet laid out any money under the contract, would be made just as whole (it may be assumed *arguendo*) if it were successfully to defend the state court action as if it were to get a federal judgment of rescission. That is to say, even if the federal prayer for damages is considered surplusage, Calvert still should not be deprived of a federal forum for its rescission action.

Seventh: We agree with the statement of the Court of Appeals, at the end of its opinion (Pet. for Cert. at A-10, 560 F. 2d at 797), that there is no need now to decide whether the conclusion of the state court proceedings would have either a res judicata or a collateral estoppel effect on the 10b-5 claim in the federal court. Nevertheless, the "brooding omnipresence" of those questions bespeaks an affirmance of the mandamus order. For:

(1) The very possibility that res judicata or collateral estoppel might be held *not* to apply in a case like this—as we shall argue if the occasion arises—was reason in itself for the federal court not to stay its hand while the possibly wasteful state court proceedings ground on.

(2) Conversely, the possibility that state court decisions *might* be given res judicata or collateral estoppel effect so as to bar the federal court's exercise of its exclusive jurisdiction over

6. See *Myzel* v. *Fields*, 386 F. 2d 718, 740-41 (8th Cir. 1967), *cert. denied*, 390 U. S. 951 (1968); *Young* v. *Taylor*, 466 F. 2d 1329, 1336 (10th Cir. 1972); *Arber* v. *Essex Wire Corp.*, 490 F. 2d 414, 422-23 (6th Cir. 1974), *cert. denied*, 419 U. S. 830 (1974); *Blackie* v. *Barrack*, 524 F. 2d 891, 909 (9th Cir. 1975), *cert. denied*, 429 U. S. 816 (1976); see also *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167, 1173 (2d Cir. 1971).

the 10b-5 action—*as American Mutual is certain to argue*—speaks even more forcefully for affirmance here.

The federal-state situation here with regard to matters uniquely federal is more than a little reminiscent of the law-equity situation in *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959). There the prospective defendant in an antitrust action sued the prospective plaintiff for a declaratory judgment in a federal court. The defendant in that action (the antitrust claimant) filed a counterclaim and demanded a jury trial. The District Court ruled that it would first adjudicate in equity, without a jury, the issues common to the complaint and the counterclaim. And this Court held that the Court of Appeals should have issued a writ of mandamus to protect the counterclaimant's right to a jury trial. For the judge's determination of the question of competition between the two theatres that were involved might operate, as the majority opinion in this Court stated, "either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim." 359 U. S. at 504, quoting from the opinion of the Court of Appeals, 252 F. 2d at 874.

Substitute "exclusive federal jurisdiction" for "right to trial by jury," and "state court" for "federal court sitting in equity," and *Beacon Theatres* argues powerfully for the federal court's being required to proceed here precisely to avoid the possibility that the exclusive jurisdiction of the federal courts might succumb to a state court determination.

(3) Whether res judicata and collateral estoppel do or do not apply, one thing is certain: As stated in the strikingly similar case of *Cotler* v. *Inter-County Orthopaedic Ass'n, P. A.*, 526 F. 2d 537, 542 (3d Cir. 1975), "Litigation over the judgment preclusion effects of the state court decision in such a context probably will be as complex as if the federal court had gone ahead with the entire case."

Eighth: It can be no answer to all this that Calvert counsel's research did not reveal the possibility of a "security" question

until it was too late to remove the state court action on the basis of diversity of citizenship:

(1) Nothing in the law *requires* removal.

(2) It has not been suggested that Calvert's federal action was barred by any period of limitations.

(3) Once it invoked the jurisdiction of the federal court, Calvert did everything possible both to persuade the state court to defer to the federal court and to persuade the federal court *not* to defer to the state court.[7] (That is all that the litany at pages 3-5 of American Mutual's brief demonstrates.)

(4) A failure to remove can hardly affect the exclusivity of the federal courts' jurisdiction under the 1934 Act.

(5) In the last analysis, the diversity of citizenship here was fortuitous. In its absence Calvert, of course, could not have removed on the basis of a federal question raised in its answer.

II. The District Court's "Unflagging Obligation" to Exercise Its Jurisdiction Is Not Excused by the Minimal Loss of "Docket Control" That May Result.

Quite apart from the fact that the Petitioner did not act out of the "crowded docket" considerations that his counsel now advance, their attempt to make a fortress out of the volume of business in the federal courts grossly overstates the argument of loss of docket control.

7. Calvert moved the state court for a stay on March 10, 1975 (Brief in Opp. to Cert. at A-3). At that point the federal court had already received briefs on the "security" point (*id.* at B-5, ¶ 8) and the state court had not even established a briefing schedule (*id.* at B-6, ¶ 12). Having failed in that attempt, Calvert asked the federal court to enjoin American Mutual from proceeding on the state side (*id.* at B-3). This, too, was unsuccessful, as were two attempts to persuade the federal court to reconsider its "stay" order as well as an attempt to seek interlocutory review of the "security" question under 28 U. S. C. § 1292(b). Having thus exhausted all other efforts to have the question decided in a federal forum, Calvert at long last succeeded (subject to this Court's disposition) via the mandamus route.

First: A crowded docket can no more justify the District Court's refusal to exercise its jurisdiction here than it did in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336 (1976), where the Court stated (at 344) that "an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason."

Second: Any loss of docket control attendant on an affirmance here could not be major in any event:

(1) First of all, *Colorado River* laid down no absolute rule. In that very case the Court concluded that deference to the state court was justified. And here the Court of Appeals did consider "whether the exceptional circumstances which *Colorado River* requires in order to justify federal deference to state proceedings are present." 560 F. 2d at 796, Pet. for Cert. at A-7. It simply found none.[8]

(2) There is no loss of control over docket in the sense that a District Court would have to move a case of this sort to the head of the list. Presumably the reason that the Court of Appeals ordered the Petitioner "to proceed immediately" was the length of time that the case had been pending.

(3) This case, if affirmed, will be a precedent only in the narrow circumstances where (a) the federal plaintiff is defendant in a state court and (b) the federal court (if this Court chooses so to limit its opinion) has exclusive jurisdiction. So far as the first factor is concerned, perhaps the Petitioner's counsel have abandoned the prediction in their petition for a writ of certiorari (p. 15) that "Litigants throughout the United States will file suits simultaneously or successively in state and federal courts, and will cite *Colorado River* and the decision below as entitling them to two trials." The point is not reflected in the Petitioner's brief, presumably because, altogether apart from the state courts' lack of jurisdiction over actions under the 1934

8. See note 2 *supra*.

Act, the courts could readily deal (whether by resort to estoppel techniques or otherwise) with the plaintiff who files concurrent state and federal actions in an attempt to get two days in court.

Certainly Calvert is not in the category of such a plaintiff by virtue of its position as defendant and involuntary counterclaimant in the state court. It could not, of course, risk a default judgment. And in view of the uncertainties of the evolving doctrines of res judicata and collateral estoppel—as well as what has been called the "common-law compusory counterclaim rule," *Restatement (Second) of Judgments,* Tentative Draft No. 1, p. 75, Reporter's Note to §56.1(2)(b)—the only prudent thing for Calvert to do was to add a counterclaim to its answer (while being careful to plead Rule 10b-5 only by way of *defense*).

Third: The Court in *Colorado River* saw nothing inconsistent with the teaching of *Landis* v. *North American Co.*, 299 U. S. 248 (1936). For it cited that case in support of the "principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions * * *." *"As between federal district courts,"* the Court said, "though no precise rule has evolved, the general principle is to avoid duplicative litigation." 424 U. S. at 817 (italics supplied).

Nothing in either *Colorado River* or the decision under review negates the general proposition of *Landis* that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket * * *." 299 U. S. at 254. The short of it is that in the federal-state context, which was not involved in *Landis,* and with the roles of the parties reversed in the two courts, the relatively minor impact that *Colorado River* and the present case (if affirmed) may have on docket control must yield to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U. S. at 817.

Whether or not it be true, as the Petitioner's brief claims (p. 16), that the Petitioner acted as he did "in the interest of judicial economy and efficiency in litigation" rather than "on grounds of federalism," the *effect* of his action is what matters. For there is no gainsaying that docket control is a matter of "judicial administration" (*Colorado River,* 424 U. S. at 817); and it does not denigrate the importance of wise *judicial administration* to suggest that that desideratum must be subservient, under our federal structure, to considerations of protecting the *jurisdiction* of the federal courts (especially when that jurisdiction is exclusive).

III. Mandamus Is the Proper Remedy to Compel a Lower Court to Exercise Its Jurisdiction When It Has a Duty to Do So

First: It is beyond argument that mandamus is an extraordinary remedy. But it is equally well settled that a "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 352 (1976), and cases cited.

Second: The Court of Appeals correctly held, we submit, that the Petitioner's order was not appealable without the §1292(b) certificate that the Petitioner would not grant. Pet. for Cert. at A-4, 560 F. 2d at 794. But it would be fruitless to debate that question, notwithstanding its having been raised by the four judges who favored rehearing en banc. 560 F. 2d at 796, n. 5, Pet. for Cert. at A-8. For (1) any distinction between the "clear legal duty" test of mandamus and the "abuse of discretion" test that would govern an appeal approaches the semantic, and (2) we have demonstrated, in any event, that the District Court's failure to recognize its "virtually unflagging obligation" to exercise jurisdiction satisfied either test.

IV. It Is Not Determinative That the District Court's Order Was in Form a "Stay" Rather Than a Dismissal

It is no answer to any of our arguments that *as a matter of form* the District Court, in granting American Mutual's motion to "abate," stated that it was "staying" all but the 10b-5 damages claim[9]—language that the Court of Appeals assumed was meant as a synonym for "abate" (560 F. 2d at 795, n. 4, Pet. for Cert. at A-7)—without using "dismissal" terminology.

First: Whether the District Court meant to say "stay" or "abate," the Court of Appeals correctly concluded that "the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case." 560 F. 2d at 796, Pet. for Cert. at A-7. To hold otherwise, as long as there was any substantial possibility that the federal complaint would ultimately be dismissed by reason of the res judicata or collateral estoppel effect of the state court judgment, would be sticking in the bark of words.

This is not like *Pullman*-type abstention,[10] where it is expressly contemplated that the case may return to federal court for resolution of the federal issues after the state questions have been decided. Any return to federal court here after the state court action is over can be only for the purpose of disposing of the federal action on principles of res judicata or collateral estoppel. The Petitioner's brief (at p. 17) seems to agree when it states that, "if at the end of state court litigation, Calvert's Rule 10b-5 claim has not become moot [a euphemism for "barred by res judicata or collateral estoppel"], Judge Will would then decide all issues before him in the light of the then existing

9. The court left "Calvert's very limited claim for monetary damages under [Rule 10b-5] as a viable claim in this court." Pet. for Cert. at B-9. But it has refused to try any part of the case.

10. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941).

posture of the state court proceedings." Indeed, the Petitioner stated to Calvert's counsel on the record (App. E):

> * * * the only issue I had was whether or not this was a security under the '34 act.
>
> Somewhat to my surprise, Judge Dunne has decided that question in the State case, which is [has] the same parties and the same subject matter; therefore, I think that is res judicata and I think it is binding on you and it is binding on me.

Second: The very cases on which *Colorado River* principally relied in talking about deference to another tribunal in the interest of wise judicial administration were cases in which federal action had been stayed, not dismissed. *McClellan* v. *Carland*, 217 U. S. 268 (1910); *Landis* v. *North American Co.*, 299 U. S. 248 (1936); *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952). And, with the Court using language like the "virtually unflagging obligation" of the federal courts to exercise their jurisdiction—a "heavy obligation" that may be disregarded only in "exceptional" circumstances (424 U. S. at 817-18, 820)—it is beyond conceit that a District Court, however well intentioned, can escape so weighty a duty by giving the label of "stay" to what will be in effect a dismissal.

CONCLUSION

The Petitioner's brief paints a picture of Calvert as trying every possible device to get two bites at the apple. American Mutual's brief, to boot, accuses Calvert of dilatory tactics (without explaining how delay in Calvert's obtaining the relief to which it thinks itself entitled would be in its interest). We say, contrariwise, that all Calvert's efforts have been devoted to the single end of getting a federal court determination of a basic question (the presence of a "security") over which the federal courts have exclusive jurisdiction under the 1934 Act and concurrent jurisdiction under the 1933 Act.

If this Court is amenable to providing a federal answer to that question by granting the petition that Calvert intends to file for a writ of certiorari to review the judgment of the Illinois Appellate Court (see note 1 *supra*), we would be more than content. Otherwise (subject to the possibility of a later review by certiorari after a complete trial and a series of appeals in the state court system, all of which would raise problems of *res judicata* and collateral estoppel) there is no way to give Calvert the federal determination to which it is entitled without affirming the order granting a writ of mandamus.

The order granting the writ of mandamus should be affirmed.

Respectfully submitted,

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Counsel for Respondent, Calvert Fire Insurance Company

Of Counsel:
BOORSTEIN & WEISSMAN
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APPENDIX A

STATE OF ILLINOIS
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE CO.,
Plaintiff,

vs.

CALVERT FIRE INSURANCE CO.,
Defendant.

No. 74 L 10737

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable Arthur L. Dunne, one of the Judges of said Court on the 6th day of June A. D., 1975.

Present:

Mr. Thomas J. Weithers, Mr. Thomas M. Hamilton, appeared on behalf of the Plaintiff;

Mr. Michael Weissman, Mr. Don Shapiro, appeared on behalf of the Defendant.

* * * * *

(pp. 63-64)

Based upon my opinion of the record, the briefs, the transcript and the arguments, it appears that the principal test, which is applied by the upper courts in the resolving of this very thorny issue, is whether or not—Strike that. Is a consideration of the nature of the transaction and the capacity of the parties dealing therein.

Accordingly, I further find, again, unfortunately at the risk of oversimplification, that the issue is simply this, whether or not the right to participate in the profits and to share the losses of this organization constitutes a security interest within the meaning of the applicable State and Federal statutes. I specifically find that it does not. That is my ruling.

* * * * *

APPENDIX B

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, etc., *Plaintiff,* *vs.* CALVERT FIRE INSURANCE COMPANY, *Defendant.*	No. 74 L 10737

ORDER STRIKING FIRST, SECOND, THIRD, FOURTH AND SIXTH AFFIRMATIVE DEFENSES

THIS CAUSE COMING TO BE HEARD on motion of the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, for leave of court to file its motion to strike the First, Second, Third, Fourth and Sixth Affirmative Defenses of the defendant, and further, for leave of court to file its reply to the Fifth and Seventh Affirmative Defenses of the defendant's answer and further, for a hearing thereon, instanter, the court having read the briefs of parties with regard to the issues raised in defendant's Affirmative Defenses and, heard on arguments of counsel with regard to those issues on June 6, 1975, due notice having been given and the court being fully advised in the premises:

IT IS HEREBY ORDERED that leave be and the same is hereby granted the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, to file its motion to strike the First, Second, Third,

Fourth and Sixth Affirmative Defenses of the defendant, CALVERT FIRE INSURANCE COMPANY, and its reply to the Fifth and Seventh Affirmative Defenses instanter.

This court makes the following findings of fact with regard to the agreement entered into by the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, and the defendant, CALVERT FIRE INSURANCE COMPANY, on January 11, 1974.

1. That the said agreement does not constitute a "security" as that term has been defined by § 1(1) of the Securities Act of 1933.
2. That plaintiff's business of obtaining reinsurance contracts constitutes the carrying on of the "business of insurance".
3. That AMERICAN MUTUAL REINSURANCE COMPANY's contract does not constitute a "security" as defined by § 137-2.1 of Illinois Securities Law of 1933 as amended (the "Illinois Securities Law"), Illinois Revised Statutes § 121½ and 137½ and Rule 130 promulgated thereunder.
4. That AMERICAN MUTUAL REINSURANCE COMPANY's contract does not constitute a "security" as defined in § 26(a)(5) of the Maryland Securities Act as amended ("Maryland Securities Act") Maryland Code Annotated Acts 32(a) § 26(a)(5)
5. That plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, properly brings this cause of action as a declaratory judgment action in this court.

Pursuant to the above findings of fact, this court makes the following conclusions of law with regard to the agreement entered into between the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, and the defendant, CALVERT FIRE INSURANCE COMPANY on January 11, 1974:

1. The McCarren-Ferguson Act, 15 U.S.C.A. § 1101-1105, precludes the application of the Securities Act of 1933 to the "business of insurance" when that business is subject to regulation by a state.

2. That CALVERT FIRE INSURANCE COMPANY was not, as a matter of law, a purchaser of a security but rather a seller of reinsurance contracts.
3. That the American Mutual Reinsurance Company's contract with Calvert is exempt from registration under § 3(a)(8) of the Securities Act of 1933.
4. That the McCarren-Ferguson Act, 15 U.S.C.A. § 1101-1105, precludes the application of the Securities Exchange Act of 1934 to the said agreement between the parties.
5. AMERICAN MUTUAL REINSURANCE COMPANY's reinsurance contract does not constitute a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953 as amended ("Illinois Securities Law") Illinois Revised Statute, Chap. 121½ § 137-2.1 and Rule 130 promulgated thereunder.
6. That the AMERICAN MUTUAL REINSURANCE COMPANY's reinsurance contract does not constitute a "security" as defined by § 26(a)(5) of the Maryland Securities Act as amended ("Maryland Securities Act"), Maryland Code Annotated Act 32A § 26(a)(5).
7. That the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, properly brings this action as a declaratory judgment action.

Pursuant to the above findings of fact and conclusions of law, it is hereby ordered that the First, Second, Third, Fourth and Sixth Affirmative Defenses of the defendant, Calvert Fire Insurance Company, be and the same are hereby stricken.

Enter ARTHUR L. DUNNE

Judge

June 16, 1975

HINSHAW, CULBERTSOM, MOELMANN,
HOBAN & FULLER
Attorneys for Plaintiff
69 West Washington Street
Chicago, Illinois 60602
630-4400

APPENDIX C

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, etc.,
Plaintiff,

vs.

CALVERT FIRE INSURANCE COMPANY,
Defendant.

No. 74 L 10737

ORDER DISMISSING COUNTS I, II AND III OF DEFENDANT'S COUNTERCLAIM

THIS CAUSE COMING to be heard on motion of the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, for entry of an order dismissing Counts I, II and III of the counterclaim filed herein by Calvert Fire Insurance Company, pursuant to the hearing before this court on June 6, 1975, the court having reviewed the briefs filed herein by the respective parties, and having heard arguments of counsel, due notice having been given, and the court being fully advised in the premises and the court having ordered on June 6, 1975 the said counts of the defendant's counterclaim were dismissed;

THIS COURT MAKES THE FOLLOWING FINDINGS OF FACT with regard to the agreement entered into between the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, and the defendant, CALVERT FIRE INSURANCE COMPANY, on January 11, 1974:

1. That the said agreement does not constitute a "security" under the Securities Act of 1933.
2. That the said agreement does not constitute a "security" under the Securities Exchange Act of 1934.
3. That the said agreement does not constitute a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953, as amended ("Illinois Securities Law") Illinois Revised Statute Chap. 121½ §137-2.1 and Rule 130 promulgated thereunder.
4. That the said agreement does not constitute a "security" as defined by 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act") Maryland Code Annotated Act 32A § 26(a)(5).

THIS COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW with regard to the agreement entered into between the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY and the defendant, CALVERT FIRE INSURANCE COMPANY on January 11, 1974.

1. That the said agreement does not constitute a "security" under the Securities Act of 1933.
2. That the said agreement does not constitute a "security" under the Securities Act of 1934.
3. The McCarren-Ferguson Act, 15 U. S. C. A. §§ 1101-1105, precludes the application of the Securities Act of 1933 to the "business of insurance" when that business is subject to regulation by a state.
4. That CALVERT FIRE INSURANCE COMPANY was not, as a matter of law, a purchaser of a security but rather a seller of reinsurance contracts.
5. That American Mutual Reinsurance Company's contract is exempt from registration under § 3(a)(8) of the Securities Act of 1933.
6. AMERICAN MUTUAL REINSURANCE COMPANY's reinsurance contract does not constitute "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953 as amended ("Illinois Securities Law") Illinois Revised Statute, Chap. 121½ § 137-2.1 and Rule 130 promulgated thereunder.

7. That the American Mutual Reinsurance Company's reinsurance contract does not constitute a "security" as defined by § 26(a)(5) of the Maryland Securities Act as amended ("Maryland Securities Act"), Maryland Code Annotated Act 32A § 26(a)(5).

PURSUANT TO THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, this court orders that Counts I, II and III of the defendant's Counterclaim be and the same are hereby dismissed.

ENTER ARTHUR L. DUNNE

Judge

June 16, 1975

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER
Attorneys for Defendant
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630-4400

Attorneys, for Defendant American Mutual Reinsurance Co.

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, *Plaintiff,* vs. CALVERT FIRE INSURANCE COMPANY, *Defendant.*	No. 74 L 10737

ORDER CERTIFYING QUESTIONS OF LAW FOR INTERLOCUTORY APPEAL

This cause coming on to be heard on the motions of the plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, to dismiss Counts I, II and III of the Counterclaim and to strike the First, Second, Third and Fourth Affirmative Defenses in the Answer of defendant, CALVERT FIRE INSURANCE COMPANY; the Court having reviewed the briefs filed herein by the respective parties, and having heard arguments of counsel, due notice having been given, and the Court being fully advised in the premises;

THE COURT HAVING ORDERED, that plaintiff's motion to dismiss Counts I, II and III of defendant's Counterclaim be granted; and

THE COURT HAVING FURTHER ORDERED, that plaintiff's motion to strike the First, Second, Third and Fourth Affirmative Defenses in defendant's Answer be granted;

The Court finds, under Rule 308 of the Rules of the Supreme Court of Illinois, that its ruling on Counts I, II and III of

defendant's Counterclaim and on the said First, Second, Third and Fourth Affirmative Defenses in defendant's Answer and the orders entered on June 16, 1975 involve questions of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation; and

The Court finds that the questions of law involved in the entry of this order are:

1. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Securities Act of 1933, 15 U.S.C. 77(b)(1)?"
2. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Securities Exchange Act of 1934, 15 U.S.C. 78c.(10)?"
3. "Does the McCarran-Ferguson Act, 15 U.S.C. 1101 et seq., preclude the application of the Securities Act of 1933 to the 'business of insurance' if that business is subject to state regulation?"
4. "When defendant, CALVERT FIRE INSURANCE COMPANY, entered into the Agreement which is annexed hereto as Exhibit 'A', did it simply sell reinsurance to plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, or did it also purchase a security from plaintiff?"
5. "Assuming that defendant, CALVERT FIRE INSURANCE COMPANY, purchased a security from plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY, was such security exempted from registration under Section 3(a)(8) of the Securities Act of 1933?"
6. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Illinois Securities Act of 1953, Chapter 121½ Ill. Rev. Stat. 137-2.1 and Rule 130 promulgated thereunder?"

7. "Is the Multiple Line Reinsurance Participating Agreement dated January 11, 1974 between AMERICAN MUTUAL REINSURANCE COMPANY and CALVERT FIRE INSURANCE COMPANY (Exhibit 'A' hereto) in any respect a 'security' under the Maryland Securities Act, 32A Md. Code Anno. 25(1)(5)?"

IT IS FURTHER ORDERED, that all proceedings in this Court shall be stayed pending final disposition of an application for leave to file an interlocutory appeal in the Illinois Appellate Court.

Dated: June 17, 1975.

ENTER:

ARTHUR L. DUNNE
Judge

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Calvert Fire Insurance Company

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

CALVERT FIRE INSURANCE CO.,
Plaintiff.

vs.

AMERICAN MUTUAL REINSURANCE CO.,
Defendant.

No. 75 C 103

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Hubert L. Will, one of the Judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on June 24, 1975, at 10:00 o'clock a.m.

Present:

Mr. Michael L. Weissman, appeared on behalf of the plaintiff;

Mr. Lawrence R. Moelmann, appeared on behalf of the defendant.

* * * * *

(pp. 4-5)

The Court: I am going to look at it, Mr. Weissman, but the only issue I had was whether or not this was a security under the '34 act.

Somewhat to my surprise, Judge Dunne has decided that question in the State case, which is the same parties and the same subject matter; therefore, I think that is res judicata and I think it is binding on you and it is binding on me.

* * * * *